



United States Department of the Interior  
Bureau of Land Management

North Dakota Field Office

December 2005

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## **RECORD OF DECISION**

**COTEAU PROPERTIES COMPANY  
FEDERAL COAL LEASE BY APPLICATION  
(NDM 91535) FOR  
WEST MINE AREA, FREEDOM MINE  
MERCER COUNTY, NORTH DAKOTA**

The Bureau of Land Management is responsible for the stewardship of our public lands. It is committed to manage, protect, and improve these lands in a manner to serve the needs of the American people for all times. Management is based on the principles of multiple use and sustained yield of our nation's resources within a framework of environmental responsibility and scientific technology. These resources include recreation; rangelands; timber; minerals; watershed; fish and wildlife; wilderness; air; and scenic, scientific, and cultural values.

BLM/MT/PL-06/002

**U.S. DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
RECORD OF DECISION  
THE COTEAU PROPERTIES COMPANY FEDERAL COAL LEASE APPLICATION  
NDM 91535  
MERCER COUNTY, NORTH DAKOTA**

**INTRODUCTION**

The Coteau Properties Company (Coteau) filed an application with the Bureau of Land Management (BLM) on January 16, 2002, to lease federal coal deposits beneath private surface contained within the company's 17,051 acre Freedom Mine, West Mine Area (WMA). This Lease By Application (LBA) as applied for, included approximately 5,571 acres with 88 million tons of recoverable federal coal reserves intermingled with non-federal coal. The Mercer County, North Dakota tract was applied for under the Code of Federal Regulations (CFR) at 43 CFR Subpart 3425.

**BACKGROUND (The Lease By Application Process)**

The Department of Interior's competitive coal leasing program, administered by BLM, is designed to provide federal coal for development to meet market demand and ensure receipt of fair market value for the federal coal offered for lease. This program promotes economically efficient and environmentally sound patterns of federal coal leasing within the framework of multiple use resource management and compatibility with state and local land use plans. Federal coal leasing decisions fully consider the views of affected states, other federal agencies, American Indian tribes, local governments, landowners, and other interested groups and individuals. The BLM recognizes the continued extraction of coal is essential to meet the nation's future energy needs (specified in the National Energy Policy as a primary goal in maintaining a diverse supply of energy supplies for the country). As a result, private development of federal coal reserves is integral to the BLM coal leasing programs under the authorities of the Mineral Leasing Act of 1920, the Federal Land Policy and Management Act of 1976 and the Federal Coal Leasing Amendments Act of 1976.

As part of BLM's coal leasing program, the LBA process is designed to provide coal for lease sale in response to applications submitted by industry. When an application to lease federal coal is submitted, the BLM must decide whether to hold a competitive lease sale or reject the application and not offer the coal for lease. As part of this decision, the BLM evaluates the quantity, quality, maximum economic recovery (MER) and fair market value (FMV) of the federal coal and evaluates the environmental impacts of leasing and mining of the federal coal. *The Coteau Properties Company Federal Coal Lease By Application (NDM 91535) For West Mine Area, Freedom Mine Mercer County, North Dakota Environmental Impact Statement* (Final EIS July 2005 and the Draft EIS April 2004) provides the BLM with the environmental analysis needed to reach a decision on whether to lease federal coal, as well as meeting its obligations to respond to the LBA applicant in a timely fashion.

By law and regulation the LBA process is an open, public, and competitive leasing process and bidding is not restricted to the applicant. A federal coal lease provides the lessee the mining rights but does not authorize mining. The impacts of mining are considered in the environmental analysis because mining is a logical consequence of issuing a coal lease. The Office of Surface Mining Reclamation and Enforcement (OSM) is a cooperating agency on the EIS because OSM is the Federal agency that administers programs that regulate surface coal mining in accordance with the Mineral Leasing Act of 1920, as amended (MLA) and the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The proposed LBA is within the Coteau Freedom Mine's West Mine Area (WMA) and is not contiguous with any other existing surface coal mines. Coteau currently holds a permit approved by the North Dakota Public Service Commission (PSC) to mine private and state coal reserves within their existing WMA (Permit Number NACT-0201). Coteau also has an air quality permit approved by the North Dakota Air Pollution Control Minor Source

Permit number 085004. Under the current air quality permit, the maximum annual coal production for the WMA is limited to 16.5 million tons per year.

As stated above, Coteau already has a permit to mine private and state coal reserves intermingled with the federal coal reserves within the WMA. The leasing of the federal coal within the WMA would promote resource conservation by allowing the maximum economic recovery of both the federal and non-federal coal. In evaluating the proposed LBA, BLM evaluated unleased federal coal adjacent to the applied for tract. BLM could not add those lands to the lease to either increase the potential for competitive interest in the tract or to reduce the potential that some of the remaining unleased federal coal would be bypassed in the future.

Mining of leased federal coal within the WMA cannot occur until the coal lessee has a permit to mine the federal coal approved by the North Dakota Public Service Commission and a Mineral Leasing Act mining plan approved by the Secretary of the Interior. Before the Mineral Leasing Act mining plan can be approved, the BLM must approve the Resource Recovery and Protection Plan for mining the tract.

Recent federal coal leasing activity in Mercer County, North Dakota includes Lease NDM 90783, which was issued on May 9, 2002, to The Coteau Properties Company at the Freedom Mine. The Freedom Mine first started production in 1983 and the first federal coal was produced from Lease NDM 071813 in 1984. Since that time, production has occurred from eight different federal leases which were issued at various times in response to applications by Coteau. There are currently no other federal coal lease applications at this mine.

## **DECISION**

The decision is to select Alternative C, referred to as Modified Leasing and described in Section 2.5 of the EIS. Under Alternative C, a lease for the LBA tract, as modified, would be issued to the successful qualified high bidder if the highest bid received at a competitive lease sale meets or exceeds the FMV as determined by the BLM and if all other leasing requirements are met. The competitive lease sale will be held under the regulations found at 43 CFR Subpart 3422, Lease Sales.

This decision is consistent with the Approved North Dakota Resource Management Plan (1988), as appended, for Public Lands Administered by the BLM North Dakota Field Office and the amended Coteau mine historic properties programmatic agreement of May 2005 and the revision 1 cultural resource management plan of April 12, 2005, for cultural resources, developed out of federal, state, and tribal consultations. Standard coal lease stipulations addressing compliance with basic requirements of the environmental statutes and BLM special stipulations are attached to this decision (Attachment 2)

It is assumed that the applicant, Coteau, will be the successful bidder on the LBA tract and the coal will be mined, processed and sold by Coteau. If the tract is mined, it would be environmentally preferable to mine and reclaim the tract in a logical sequence with the ongoing mining and reclamation operations at an adjacent existing mine. This would be consistent with the analysis of the impacts described in the FEIS.

## **REASONS FOR THE DECISION**

The reasons for selecting the Preferred Alternative C (Modified Leasing) are as follows:

- The decision is in conformance with BLM land use plans covering this area.
- The BLM estimates 89 million tons of recoverable federal coal (1 million tons more than estimated by the applicant) would be bypassed if it was not leased. Coteau has received approval from the North Dakota Public Service Commission to mine the adjacent private and state coal reserves within the WMA under Permit Number NACT-0201.
- The environmental impacts of this decision were fully disclosed in the draft EIS and public comment was addressed in the Final EIS. The Alternative C, as described in the Final EIS, reflects an effort to additionally minimize the loss of significant cultural features by bypassing approximately 81 additional acres of federal coal above that in the Draft EIS

- Alternative C incorporates a preservation component for the American Indian stone features. As a result of Tribal consultations, a programmatic agreement and management plan for cultural resources within the entire WMA was developed to reduce impacts to the cultural landscape as a consequence of coal mining. Alternative C disturbs fewer cultural features within the WMA and protects a portion of them for Indian cultural education. The preferred alternative would lease 237 acres and an estimated 4 million tons Federal coal less than originally sought in Coteau's application. The NW¼ and the S¼SW¼ Section 4, T. 145 N., R. 88 W. will be removed from the offered lease to avoid significant cultural sites. Approximately 4 acres within the NW¼ Section 14 and 81 acres within the NE¼ Section 22, T. 145 N., R. 88 W. will be leased with a stipulation that protects cultural areas from mining related disturbance.
- Under Alternative C a collection of the cultural landscape's significant stone features are preserved in the North Dakota Indian Cultural Education Trust. The Trust includes 300 undisturbed acres within the WMA, 420 reclaimed acres, and approximately \$400,000. An additional 557 acres will be avoided by mining associated activities. Outside the WMA 520 acres, 225 undisturbed and 295 previously mined and reclaimed, will also be donated to the trust.
- The purpose of the application for the LBA tract is to allow the lessee access to a continuing supply of lignite coal that would be sold to adjacent power plants for the purpose of generating electrical power, and to the Dakota Gasification Company's Synfuels Plant for production of natural gas.
- The leasing of the federal coal within the WMA would promote resource conservation by allowing the maximum economic recovery of the coal, which is intermingled with private and state coal already permitted for recovery. The rate of recovery is market driven and would not change because of the leasing. Leasing would extend the projected lifetime of Freedom Mine without an annual increase in production. Economic stability would be maintained in the communities in this area without placing additional demands on the existing infrastructure or services.
- The alternative selected meets the goals of the National Energy Policy and achieves the objectives of the federal coal leasing programs managed by the BLM. The National Energy Policy encourages the development of domestic oil, gas, and coal reserves and reduction of the United States' dependence on foreign sources of energy.
- Leasing of federal coal is strongly supported by the North Dakota Governor, and other state and local officials. The leasing and subsequent mining of federal coal reserves provide the United States, the State of North Dakota, and affected local counties with income in the form of lease bonus payments, lease rental and royalty payments, and tax payments.

## PUBLIC INVOLVEMENT

On January 18, 2002 the Montana State Office BLM received application from Coteau to lease federal coal located within their West Mine Area (WMA). The North Dakota Field Office, preparer of this EIS received notification in early February of 2002 to furnish an environmental analysis report and any special stipulations. Scoping letters were sent to the Dakota's Resource Advisory Council members, commercial interests, representatives for North Dakota State legislature, state government officials, appropriate federal agencies, environmental organizations, North Dakota Congressional representative, county government, landowners within the WMA, and tribal representatives on February 20, 2002. The purpose of the letter was to assess the interest and complexity of environmental impacts of the proposal to determine if an EIS was warranted. At the same time a number of conversations were occurring with Tribal representatives to determine the impact to their community. As a result of the comments received and consultation with the Indian community, the North Dakota Field Office determined that an EIS was needed to address issues and concerns raised.

On April 26, 2002, the BLM published notice of the receipt of this lease application in the Federal Register (Volume 67, Number 81). The Notice of Intent to Prepare an EIS and a Notice of Scoping was published in the Federal Register of March 6, 2003, (Volume 68, Number 44). Scoping notices were mailed to over 190 Federal, State, Tribal and local government agencies, conservation groups, commodity groups, and individuals who could be impacted by this lease application on March 11, 2003. The mailing list was jointly developed by BLM, OSM, PSC, and the applicant.

The Draft EIS "*The Coteau Properties Company Federal Coal Lease Application NDM 91535 for West Mine Area, Freedom Mine, Mercer County, North Dakota*" was mailed to the public and other interested parties, at the end of

April in 2004. On April 30, 2004, (Volume 69, Number 84) the Environmental Protection Agency (EPA) published the weekly receipt of the Environmental Impact Statements Notice of Availability in the Federal Register. On May 7, 2004, the EPA published its Notice of Availability of the Draft EIS in the Federal Register (Volume 69, Number 89) which included Notice of Public Hearing on the Draft EIS and Maximum Economic Recovery/Fair Market Value. The same notice provided the schedule of public meetings. With the publication of the EPA's Notice of Availability in the Federal Register, the 60-day review and comment period on the Draft EIS started on May 7, 2004, and ended on June 29, 2004. Notices were placed in the Bismarck Tribune (May 27 and 28 and June 2, 9, and 16, 2004) and the Lakota Journal (June 4-11, 2004) for public meetings and hearing. Three meetings were held between June 1 and 3, 2004. They included meetings at Four Bears Casino and Lodge, New Town, North Dakota, on the Fort Berthold Reservation; at the Civic Center in Beulah, North Dakota, the nearest community of size to the WMA; and at the Prairie Knights Casino, Fort Yates, North Dakota on the Standing Rock Sioux Tribes Reservation. To solicit additional public comment on the Draft EIS, the proposed lease sale, the fair market value determination and maximum economic recovery of the Federal coal under consideration, a formal public hearing was held on June 23, 2004, in Bismarck, North Dakota. Extensive Tribal consultation concerning the development of the Preferred Alternative was conducted as part of the National Historic Preservation Act compliance. The Final EIS was mailed to the public and other interested parties in August 2005. The EPA published a Notice of Availability of the Final EIS in the Federal Register on August 26, 2005 (Volume 70, Number 165), and the BLM published a Notice of Availability of the Final EIS in the Federal Register on September 2, 2005 (Volume 70, Number 170).

During the EIS scoping period the BLM received 26 written comments on the Draft EIS. No parties commented at the June 23, 2004 public hearing. 12 written comments were received on the Final EIS. The comments made on the Draft EIS with BLM responses are included in the Final EIS and the comments received on the Final EIS are summarized in Attachment 1. The written comments and the transcript of the formal hearing are on file at the BLM North Dakota Field Office, Dickinson, North Dakota and BLM Montana State Office, Billings, Montana. All comments that were received during the EIS process were considered in the preparation of both the Draft and Final EISs, and in this Record of Decision.

## **ALTERNATIVES ANALYZED IN DETAIL**

The EIS analyzed three alternatives for the LBA tract in detail: the Proposed Action (Alternative A), the No Action Alternative (Alternative B), and Modified Leasing (Alternative C also identified as the preferred alternative). These alternatives are summarized below. A full description of each of the alternatives analyzed in detail may be found in Chapter 2 of the EIS. Each alternative that involves leasing of federal coal assumes that the applicant will be the successful bidder on the LBA tract and that the coal will be mined, processed and sold by Coteau.

The Proposed Action (Alternative A) considers leasing the tract as requested in the lease application. Coteau filed an application to acquire federal coal as a maintenance tract under federal coal regulations at 43 CFR 3425, Leasing By Application. Under Alternative A the BLM would lease the requested 5,571 acres of federal coal beneath private surface. The lease tract would be subject to standard and special lease stipulations. The coal (an estimated 93 million tons of recoverable federal lignite) would complement reserves of the Freedom Mine.

The No Action (Alternative B) would reject the coal lease application. The federal coal tract would not be leased although existing private and state leases at the Freedom Mine's WMA would be developed according to approved mining and reclamation plans (PSC Surface Coal Mining Permit NACT-0201).

The Modified Leasing (Alternative C) considers leasing 5,334 acres of federal coal acres (an estimated 89 million tons of recoverable lignite). This is 4 million tons of Federal coal and 237 acres less than the original the LBA tract applied for by Coteau and reflects the added measures required to protect and preserve a selection of the cultural resources in the proposed permit area. The alternative considers ways of preserving, mitigating, and minimizing impacts to cultural resources, which are meaningful to American Indian Tribes of the Great Plains and others. Alternative C was modified since the release of the Draft EIS in April of 2004 because of the inability to acquire certain lands referenced in the Draft EIS for donation to North Dakota's Indian Cultural Education Trust. The Programmatic Agreement and Management Plan for cultural resources allow for modification of the Plan, including which cultural landscape's features will be avoided or preserved. The Alternative's modification was developed in continued consultation with the lessee, the North Dakota State Historic Preservation Office, The Advisory Council

on Historic Preservation, Three Affiliated Tribes, Fort Peck Assiniboine and Sioux, and the Standing Rock Sioux Tribe as part of National Historic Preservation Act compliance for this undertaking. The final management plan of April 12, 2005 enumerates the lands and monies avoided, preserved, or placed in the education trust.

Description of lands to be offered for competitive sale under the Modified Leasing, Alternative C:

T. 144 N., R. 88 W., 5<sup>th</sup> P.M.

Sec. 2: Lots 3, 4, S<sup>1</sup>/<sub>2</sub>NW<sup>1</sup>/<sub>4</sub>

Sec. 4: Lots 1, 2, S<sup>1</sup>/<sub>2</sub>NE<sup>1</sup>/<sub>4</sub>, S<sup>1</sup>/<sub>2</sub>

Sec. 6: All

Sec. 8: N<sup>1</sup>/<sub>2</sub>NE<sup>1</sup>/<sub>4</sub>, SE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>, NW<sup>1</sup>/<sub>4</sub>, N<sup>1</sup>/<sub>2</sub>SW<sup>1</sup>/<sub>4</sub>

T. 144 N., R. 89 W., 5<sup>th</sup> P.M.

Sec. 12: E<sup>1</sup>/<sub>2</sub>

T. 145 N., R. 88 W., 5<sup>th</sup> P.M.

Sec. 4: E<sup>1</sup>/<sub>2</sub>

Sec. 10: N<sup>1</sup>/<sub>2</sub>

Sec. 14: All

Sec. 22: All

Sec. 26: N<sup>1</sup>/<sub>2</sub>NE<sup>1</sup>/<sub>4</sub>, SW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>, NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>, W<sup>1</sup>/<sub>2</sub>

Sec. 28: E<sup>1</sup>/<sub>2</sub>NE<sup>1</sup>/<sub>4</sub>, SW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>, SE<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>, S<sup>1</sup>/<sub>2</sub>

Sec. 34: N<sup>1</sup>/<sub>2</sub>N<sup>1</sup>/<sub>2</sub>, SE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>, E<sup>1</sup>/<sub>2</sub>SE<sup>1</sup>/<sub>4</sub>,

SW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub>, SW<sup>1</sup>/<sub>4</sub>

Total surface included in the LBA tract, as modified, is 5,334 acres, more or less. BLM estimates that it contains approximately 89 million tons of recoverable coal. BLM's estimate for the quality of recoverable tons of federal coal within the modified LBA tract will be included in the sale notice for the tract.

#### **THE ENVIRONMENTALLY PREFERRED ALTERNATIVE**

The Council on Environmental Quality (CEQ) has defined the environmentally preferable alternative as the alternative that will promote the national environmental policy as expressed in Section 101 of the NEPA. This section lists six broad policy goals for all Federal plans, programs, and policies:

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
5. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Based on these criteria, identification of the environmentally preferable alternative(s) involves balancing current and potential resource uses with the need to protect resources, as well as consideration of the human environment. Alternative B (No Action) could be viewed the least environmentally preferable alternative. Even if the federal coal is bypassed, it is estimated that 40 percent of the landscape would sustain direct impacts and another 40 percent of the landscape could sustain indirect impacts from the already approved mining of private and state coal deposits within the WMA. With the bypass of federal coal, the duration of good paying jobs and the generation of electrical power from coal for North Dakota communities would be diminished.



Alternative A (Proposed Action) provides the most economic benefit in the short-term by the mining of the greatest quantity of federal coal reserves while preserving cultural resources. Alternative C (Preferred Alternative) would provide a balance between economic benefits of strip mining coal and preservation of important cultural and natural aspects of our national heritage within the WMA, while providing sustainable economic development and the near maximum use of attainable coal reserves. Alternative C, the agency preferred alternative, is considered the environmentally preferable alternative when taking into consideration the human (social and economic) environment as well as the natural environment.

#### **ALTERNATIVES CONSIDERED BUT NOT ANALYZED IN DETAIL**

These are not found in the EIS, but were considered by staff and in consultation meetings with Tribal Representatives.

One such alternative considered was, as under the Proposed Action, BLM would hold a competitive coal lease sale for the tract as described in Alternative C and then issue a lease to the successful bidder. This assumed that the applicant would not be the successful bidder, and that the Federal coal would be developed as a new stand-alone mine. BLM determined that no bidder other than the applicant could feasibly develop the reserves because of the intermingling of the tract within an existing mining operation. This alternative was considered and eliminated from detailed study because the situation appears to make construction of a new mine economically unfeasible.

Multiple alternatives of leasing less coal were discussed in tribal consultation meetings, including the No Action Alternative. The alternatives considered ways of preserving, mitigating, and minimizing impacts to cultural resources which are meaningful to American Indian Tribes of the Great Plains and others. Alternative C, was modified since the release of the Draft EIS in April of 2004. The modification allowed for additional stone features to be preserved within the WMA as lands outside the WMA were no longer available to offset the loss of stone features within the WMA. The change was made in continued consultation with the lessee, the North Dakota State Historic Preservation Office, The Advisory Council on Historic Preservation, Three Affiliated Tribes, Fort Peck Assiniboine and Sioux, and the Standing Rock Sioux Tribe as part of National Historic Preservation Act compliance for this proposed undertaking.

#### **MITIGATION, COMPLIANCE AND MONITORING**

If the LBA tract is leased, the lease will contain the standard coal lease stipulations. The lessee must also comply with the provisions of the approved Programmatic Agreement and Management Plan for cultural resources which is on file at the North Dakota Field Office, Dickinson, North Dakota (The documents are not provided to the public to protect sensitive data). The attached BLM Standard and Special Stipulations (Attachment 2) regarding cultural resources, paleontological resources, threatened and endangered species, multiple mineral development of oil and gas or coal resources or both, resource recovery and protection, and public land survey will be added to the coal lease. The Surface Mining Control and Reclamation Act (SMCRA), gives OSM authority to administer programs that regulate surface coal mining operations. The PSC, as an approved program under OSM, regulates coal mining activities in North Dakota as provided for under SMCRA and state law.

If Coteau is the successful, qualified high bidder on federal coal tract NDM 91535, a permit revision must be approved by the PSC. The existing mitigation measures specific to the currently approved mine plan for the adjacent mine will be revised to include mitigation measures specific to mining Lease NDM 91535 when the mining permit is amended. If the successful, qualified high bidder does not operate an adjacent mine and proposes to construct and operate a new mine, then a new permit and a new mining plan must be prepared and approved before the coal can be mined. Before Lease NDM 91535 can be mined, mitigation measures and monitoring plans specific to a mining and reclamation plan must be attached to any revised or new mining and reclamation plan.

Prior to mining the coal lease, all practical means to avoid or minimize environmental harm to protected cultural areas will be adopted as leasing stipulations and the mining permit will contain conditions consistent with normal mining practices. The BLM will review the Resource Recovery and Protection Plan prior to approval of the mining plan to ensure that the revised plan is in compliance with the leasing stipulations. Before any mining of the LBA Tract can begin, the Resource Recovery and Protection Plan must be approved by the BLM, a new permit or permit



revision must be approved by PSC, and the Mineral Leasing Act mining plan must be approved by the Assistant Secretary of the Interior.

## RECOMMENDED ALTERNATIVE

I recommend that, after a competitive lease sale, modified Federal Coal Tract NDM 91535 and its associated 5,344 acres more or less, be issued to the successful, qualified high bidder provided it is determined that the highest bid meets, or exceeds, the fair market value of the tract as determined by the BLM and that all other leasing requirements are met, especially including compliance with the approved programmatic agreement and management plan for cultural resources. This is the Selected Alternative described in this record of decision. The competitive lease sale will be held in accordance with the requirements at 43 CFR Subpart 3422. The lease will be subject to the attached BLM special lease stipulations.

  
North Dakota Field Office Manager

11-01-2005

Date

## APPEAL PROCEDURES

You may appeal this decision to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842.1. If you appeal this decision, you must file a notice of appeal in this office (at the above address) within 30 days from receipt of this decision. You, as the appellant, have the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay (suspension) of the effectiveness of this decision during the time your appeal is being reviewed by the Board pursuant to Part 4, Subpart B, § 4.21 of Title 43, Code of Federal Regulations, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

1. The relative harm to the parties if the stay is granted or denied,
2. The likelihood of the appellant's success on the merits,
3. The likelihood of immediate and irreparable harm if the stay is not granted, and
4. Whether the public interest favors granting the stay.

## APPROVAL

I agree with the recommendation of the North Dakota Field Manager, and I approve the decision to offer the modified Federal coal tract, NDM 91535, for competitive coal lease.

  
BLM Montana State Director

11/2/05  
Date

## **Attachment 1:**

### **PUBLIC COMMENTS RECEIVED IN REFERENCE TO FINAL EIS FOR THE WEST MINE AREA LBA TRACT (NDM91535) AND BLM RESPONSES**

The BLM received twelve written comments to the Final EIS (Notice of Availability published in the Federal Register on August 26, 2005).

Ten (10) comments from local and state government supported the preferred alternative (Alternative C); One (1) private comment received asked the BLM to require a \$25 million bond before the coal is leased; and One (1) comment received from EPA recommended that at least 15 to 20 additional acres of wetland mitigation be developed through the lease, the mine reclamation plan or other negotiations between Coteau Properties, the State, BLM and other agencies.

Under current regulations the BLM can not require prospective lessees to post bonds before the lease is issued. Proper bonding will be approved by the State of North Dakota when the actual mining permit is issued, and by the BLM when the Resource Recovery and Protection Plan is approved. Bonds required by the State cover all rehabilitation and the bond required by the BLM covers payment of federal royalties.

The loss of a fen and wetlands is addressed in the current PSC permit. Under this permit a total of 36 acres of seasonal wetlands and 40 acres of additional native grassland would be established. Any additional acreage will be negotiated with the State during the actual mining permit amendment process.

These comments were considered in the preparation of this Record of Decision. All written comments are on file at the BLM North Dakota Field Office, Dickinson, North Dakota.

## **Attachment 2:**

### **BLM Special Coal Lease Stipulations for the Modified NDM 91535**

**Sec. 15. SPECIAL STIPULATIONS** - In addition to observing the general obligations and standards of performance set out in the current regulations, the lessee shall comply with and be bound by the following stipulations. These stipulations are also imposed upon the lessee's agents and employees. The failure or refusal of any of these persons to comply with these stipulations shall be deemed a failure of the lessee to comply with the terms of the lease. The lessee shall require his agents, contractors and subcontractors involved in activities concerning this lease to include these stipulations in the contracts between and among them. These stipulations may be revised or amended, in writing, by the mutual consent of the lessor and the lessee at any time to adjust to changed conditions or to correct an oversight.

#### **(a) CULTURAL RESOURCES -**

(1) Before the approval of a mining plan, the authorized officer (AO) may require a survey of all or part of the leased land to provide an inventory of any historical, cultural, and archeological values. The survey shall be conducted by a qualified professional cultural resource specialist (i.e., archeologist, historian, historical architect, as appropriate), approved by the AO, and a report of the survey shall be submitted to the AO. The approval of an exploration or mining plan or the continuation of lease operations may be conditioned on the approval of the survey report and the approval of measures to protect the historical, cultural and archeological values. The cost of any survey or measures to protect such values discovered as a result of the survey shall be borne by the lessee and items and features of historical, cultural, or archeological value shall remain under the jurisdiction of the United States.

(2) If any items or features of historical, cultural, or archeological value are discovered during lease operations, the lessee shall immediately notify the mining supervisor and shall not disturb such items or features until the mining supervisor issues instructions. If the lessee is ordered to take measures to protect any items or features of historical, cultural, or archeological value discovered during lease operations, the cost of the measures shall be borne by the lessor and such items and features shall remain under the jurisdiction of the United States.

#### **(b) PUBLIC LAND SURVEY PROTECTION -**

The lessee will protect all survey monuments, witness corners, reference monuments, and bearing trees against destruction, obliteration, or damage during operations on the lease areas. If any monuments, corners or accessories are destroyed, obliterated or damaged by this operation, the lessee will hire an appropriate county surveyor or registered land surveyor to reestablish or restore the monuments, corners, or accessories at the same locations, using surveying procedures in accordance with the "Manual of Surveying Instructions for the Survey of Public Lands of the United States." The survey will be recorded in the appropriate county records, with a copy sent to the AO.

#### **(c) PALEONTOLOGICAL RESOURCES -**

If a paleontological resource is discovered during surface coal mining operations, the lessee shall contact the AO as soon as possible. The operations on the lease shall be suspended within 250 feet of said discovery. A paleontological resource as used herein shall refer to vertebrate fossils. The Bureau of Land Management (BLM) will evaluate the fossil find within 72 hours of notification, and determine the appropriate action(s) necessary to prevent the potential loss of significant paleontological resource values. The AO will notify the lessee within 48 hours after completion of the evaluation as to when surface coal mining operations can resume within 250 feet of such discovery. The lessee will bear the cost of any required paleontological resource appraisals, surface collection of fossils, or salvage of fossils of significant interest discovered during surface coal mining operations.

**(d) RESOURCE RECOVERY AND PROTECTION -**

Notwithstanding the approval of a resource recovery and protection plan (R2P2) by the BLM, lessor reserves the right to seek damages against the operator/lessee in the event (i) the operator/lessee fails to achieve maximum economic recovery (MER) [as defined at 43 CFR §3480.0-5.2(21)] of the recoverable coal reserves or (ii) the operator/lessee is determined to have caused a wasting of recoverable coal reserves. Damages shall be measured on the basis of the royalty that would have been payable on the wasted or unrecovered coal.

The parties recognize that under an approved R2P2, conditions may require a modification by the operator/lessee of that plan. In the event a coalbed or portion thereof is not to be mined or is rendered unmineable by the operation, the operator shall submit appropriate justification to obtain approval by the AO to leave such reserves unmined. Upon approval by the AO, such coalbeds or portions thereof shall not be subject to damages as described above. Further, nothing in this section shall prevent the operator/lessee from exercising its right to relinquish all or a portion of the lease as authorized by statute and regulation.

In the event the AO determines that the R2P2 as approved will not attain MER as the result of changed conditions, the AO will give proper notice to the operator/lessee as required under applicable regulations. The AO will order a modification if necessary, identifying additional reserves to be mined in order to attain MER. Upon a final administrative or judicial ruling upholding such an ordered modification, any reserves left unmined (wasted) under that plan will be subject to damages as described in the first paragraph under this section. Subject to the right to appeal hereinafter set forth, payment of the value of the royalty on such unmined recoverable coal reserves shall become due and payable upon determination by the AO that the coal reserves have been rendered unmineable or at such time that the lessee has demonstrated an unwillingness to extract the coal.

The BLM may enforce this provision either by issuing a written decision requiring payment of the Minerals Management Service demand for such royalties, or by issuing a notice of non-compliance. A decision or notice of non-compliance issued by the lessor that payment is due under this stipulation is appealable as allowed by law.

**(e) MULTIPLE MINERAL DEVELOPMENT -**

Operations will not be approved which, in the opinion of the authorized officer, would unreasonably interfere with the orderly development and/or production from a valid existing mineral lease issued prior to this one for the same lands.

The BLM realizes that coal mining operations conducted on Federal coal leases issued within producing oil and gas fields may interfere with the economic recovery of oil and gas; just as Federal oil and gas leases issued in a Federal coal lease area may inhibit coal recovery. BLM retains the authority to alter and/or modify the R2P2 for coal operations on those lands covered by Federal mineral leases so as to obtain maximum resource recovery.

**(f) OTHER SPECIAL STIPULATIONS -**

The lessee must comply with all provisions of the Programmatic Agreement and Management Plan for cultural resources within the West Mine Area.

Stipulation to prevent mine related disturbance in the protected cultural areas for approximately 4 acres more or less within the NW ¼ of Section 14, and 81 acres more or less in the NE ¼ of Section 22, both of T145N, R89W.